An award of $50,000 for a saleman is therefore so out of line with similar cases that it calls for correction by an appeal court. We were not persuaded that the failure of the respondent to secure employment for a period of, as he said, 72½ months was the result of the defamation. And it is to be observed that in his subsequent employment, he was downgraded from an assistant manager in the Miri Theatre at a monthly salary of $280 to an operator at $200 per month after an intermediate post as Manager Roxy Theatre at $350 per month. He did not appear to have given his new employers much satisfaction as an employee. For ourselves we would have thought $8,000 a sufficient recompense.

But our view is that the defence of qualified privilege succeeds, the respondent's claim in the High Court must be dismissed with costs, the appeal allowed and the cross-appeal dismissed with costs. The deposit is to be refunded to the appellants.

Appeal allowed.

Solicitors: *Battenberg & Talma; Thomas & Co.*

DATUK HAJI DZULKIFLI BIN DATUK ABDUL HAMID v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Syed Othman F.J., Salleh Abas F.J. & Chong Siew Fai J.) August 18 & October 21, 1980]

[Kota Kinabalu — Federal Court Criminal Appeal No. 3 of 1980]

Criminal Law and Procedure — Official Secrets — Charge of receiving secret official information or secret official document — Communicating information or document — Whether document secret document — Sentence — Official Secrets Act, 1972, s. 8.

Official Secrets — Receiving and communicating secret official document — Official Secrets Act, 1972, s. 8.

In this case the appellant had been convicted on the offences of receiving secret official information and a secret official document and communicating them. The allegation was that the appellant received the copy of a letter from the then Chief Minister of Sabah to the Minister for External Affairs which he knew to be an official secret document and that he had communicated the document to other persons. He stated he received the copy by post through the ordinary mail. The main point raised on the appeal was the question whether the information or document was secret. It was argued that the information and document were inseparable from each other and that the information was no longer secret because the matters pertaining to Philippines refugees in Sabah, with which the letter dealt, were already publicly known and therefore the document was no longer secret.

Held: (1) a document does not lose its status as a secret document merely because some unauthorised person or persons stole it, reproduced a copy and sent the copy by post to the appellant anonymously; nor does it lose its secrecy just because the letter happens to contain information which is already known to the public;

(2) if the originator or the owner of the document treats it and the information contained in it as secret and clearly marks it and keeps it as such, it is not open to anyone to regard it as otherwise. The law must give protection to such a document even though it contains information generally known to the public;

(3) having regard to the evidence in this case the appellant ought to be more appropriately convicted on the charges in respect of the document rather than of the information. The convictions on the principal charges should therefore be set aside and the convictions on the alternative charges confirmed;

(4) the sentences would be reduced to a fine of $1,000 on each of the first and fourth charges and a fine of $1,500 on each of the second and third charges and in default of each fine to a term of three months' imprisonment;

(5) the practice of stealing secret documents and leaking the information contained in them to unauthorised persons is highly dangerous to the country and the court will not hesitate to impose proper and adequate sentences in future, where circumstances merit such punishment.

Case referred to:-

(1) *Lim Kit Siang* v. *Public Prosecutor* [1980] 1 M.L.J. 293.

FEDERAL COURT.

D.J. Puthucheary for the appellant.

Mohtar bin Abdullah (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): To contradict what was reported to have been said by the Chief Minister of Sabah, Datuk Harris Salleh, on the State policy concerning Philippines refugees — which report was published in the New Straits Times on January 9, 1978, under the caption "Sabah will adopt open-door policy towards refugees" and on January 10 under the heading "Harris clarifies his step on refugees", on January 11 Kinabalu Sabah Times (in short K.S. Times) published an article (P3) headlined "Harris open policy on refugees under fire." This article criticized the Chief Minister for the statements he made to the New Straits Times on January 9 and 10. To lend credibility to the article, K.S. Times also published a copy of the letter written by the late Chief Minister, Tuan Haji Mohd. Faud Stephens to Tengku Ahmad Rithauddeen, the Minister of External Affairs. The letter as published in P3 was dated May 11, 1976, and carried a reference "S303/571/86" and had the signature of the late Chief Minister, Tuan Haji Mohd. Fuad Stephens. As published it did not carry the word "Rahsia".

Subsequent police investigation which was carried on pursuant to a report lodged by the Sabah State Secretary, Datuk Haji Abdul Hamid Egoh (PW5), resulted in the appellant being tried on the following charges —

(1) for receiving secret official information, or alternatively secret official document, contrary to section 8(2) of the Official Secrets Act, 1972;

(2) for directly communicating the said information or alternatively the said document to one Jacob Peter Bedion, contrary to section 8(1)(i);

(3) for indirectly communicating the said information or alternatively the said document to one Sabidin Ghani, contrary to section 8(1)(i); and

(4) for not taking reasonable care of the said information or alternatively the said document, contrary to section 8(1)(iv).

The learned trial judge found that the appellant was guilty of all the principal and alternative charges and so convicted him on all these charges. He sentenced the appellant to a fine of $3,000 on each charge or in default of fine to a term of nine months' imprisonment; the sentences on the alternative charges being

ordered to run concurrently therewith. The appellant appealed against the conviction and sentence.

At our special sitting in Kota Kinabalu on August 18, 1980, after listening to arguments of counsel of the appellant and Senior Federal Counsel we announced our decision that the convictions on the principal charges were set aside, but the convictions on the alternative charges were confirmed. We also reduced the sentences so that the appellant was then fined $1,000 on each of the first and fourth charges and $1,500 on each of the second and third charges, and in default of each fine we imposed a term of three months' imprisonment. In announcing that decision we also indicated that we would give our reasons in writing later. Hence this judgment.

The main point raised in this appeal insofar as the convictions were concerned only deals with the question whether the information or document was secret. Counsel for the appellant submitted that the information and document were inseparable from each other and that the information was no longer secret because matters pertaining to Philippines refugees in Sabah were already publicly known and that therefore the document too was no longer secret. With respect we do not agree with the submission.

The letter as published in P3 is a photo reproduction in reduced size from a photostat copy, (not exhibited in court) which the appellant gave to Jacob Peter Bedion (PW7) and Sabidin Ghani (PW8), who in turn in the presence of the appellant gave it to Richard de Souza (PW4) with instruction to publish it in reduced size. The appellant said in his evidence that he received the photostat copy through the ordinary mail a few days before its publication in the K.S. Times. Jacob Peter Bedion (PW7) was on the staff of the K.S. Times and the author of the article "Harris open policy on refugees under fire", whilst Sabidin Ghani (PW8) was the Chief Editor of the paper who edited the article. Richard de Souza (PW4) was the photographer and lithographer employed by K.S. Times. The evidence of these witnesses shows how the document came to be published. It was published from a photostat copy which was given to them by the appellant. This copy was returned by Richard de Souza (PW4) to Sabidin Ghani (PW8) and after this nothing more was heard of this copy. It was not tendered in court as an exhibit and no question was asked as to its whereabouts.

However, the appellant said that he received the copy through the ordinary post and that like the photo copy as published in P3 itself, the photostat copy did not bear the word "Rahsia", nor carry the printed letters CMD, nor the state crest and the address of the Chief Minister's office. It did, however, carry the reference "S303/571/86". Because the copy was not marked "Rahsia" the appellant contended that the letter was not secret. In our view, this contention is untenable. The appellant has had a long career in the Government service, both as a civil servant and as a Minister. He is definitely familiar with the system of marking and classifying files. Like the trial judge, we cannot accept his pretence that he did not know the significance of the letter "S" which was typed on this copy.

From the evidence adduced by the prosecution it is clear that the copy from which the photocopy in P3 was reproduced was itself a reproduction from the carbon copy exhibit P4 which was marked "Rahsia" and kept in the confidential file of the Sabah Chief Minister's Department, whilst the original copy exhibit P1 was sent to the Minister of External Affairs in Kuala Lumpur and likewise kept in the confidential file of the Ministry. Datuk Haji Abdul Hamid Egoh, the State Secretary (PW5), explained the system of marking and classifying the files of the Sabah State Government. He said the letter "S" preceding the file number stands for the word "secret". He said that after the original copy exhibit P1 was despatched, the carbon copy exhibit P4 was retained in a secret file entitled "Orang-orang Pelarian (Refugees)" and that to add further secrecy thereto, the title of the file was written inside the file cover and not outside. The letter and the file were not accessible to anyone, their existence being known only to the late Chief Minister and possibly to seven members of the clerical staff who might have handled them. PW5 called upon all of them to explain the leakage, but none could give any clue. Thus, from his evidence, it shows how careful was the step taken by him to preserve the secrecy of the letter.

In our view, a document does not lose its status as a secret document merely because some unauthorised person or persons stole it, reproduced a copy and sent the copy by post to the appellant anonymously; nor does it lose its secrecy just because the letter happens to contain information which is already known to the public. If this argument is acceptable, it makes no sense of the secrecy of examination papers and even our draft judgments before they are released, as the information contained therein can openly be found elsewhere, in text books, periodicals, magazines and newspapers. In our view such a contention is totally unacceptable. If the originator or the owner of the document treats it and the information contained in it as a secret and clearly marks it and keeps it as such, we do not think that it is open to anyone to regard it as otherwise. The law must give protection to such document or information even though it contains information generally known to the public. In the present case, nothing that had transpired since the letter was written on May 11, 1976, has given rise to any implication that its disclosure was authorized or that it had lost its secrecy. The letter still remained classified and kept in the secret registry. It is obvious that someone must have stolen the letter for a moment and photostated it in order to send the photostat copy to the appellant. The appellant who received it and has had long experience in Government service cannot be heard to say that he did not know that the document was a secret document. He must have known what the letter "S" stands for. Furthermore, from the nature of the document itself, a person with some intelligence must have appreciated that it must be a secret letter. The letter made a suggestion to the Federal Government to make a public announcement encouraging the refugees to be repatriated on the assurance — which was to be sought — that the Philippines Government would assist them in a number of projects. It is common sense that such proposal should be kept secret. We are therefore of

the view that the submission of the counsel for the appellant should be rejected.

The appellant was convicted on both the principal and alternative charges. But having regard to the evidence, we think that the appellant ought to be more appropriately convicted on the charges in respect of document rather than of information. Hence we set aside the convictions on the principal charges, but confirmed those on the alternative charges.

As regards sentences we are of the opinion that we have to be consistent with the sentences imposed in *Lim Kit Siang* v. *Public Prosecutor*.[1] So we altered them to a fine of $1,000 on each of the first and fourth charges and a fine of $1,500 on each of the second and third charges and in default of each fine to a term of three months' imprisonment. We, however, wish to say here that the sentences imposed in these two cases should not be taken to be the standard for sentencing future offences under the Official Secrets Act. Lim Kit Siang's case and this case are the first two cases ever brought before the court under the Act. We consider that the practice of stealing secret documents and leaking the information contained in them to unauthorized persons is highly dangerous to the country, and we will certainly not hesitate in future to impose proper and adequate sentences, where circumstances merit such punishment.

Appeal dismissed.

Solicitors: *Rayner & Co.*

YAP YEOK LANG v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Ibrahim Manan F.J. & Hashim Yeop A. Sani J.) October 27, 1980]

[Kuala Lumpur — Federal Court Criminal Appeal No. 41 of 1977]

Criminal Law and Procedure — Security case — Statement made by accused to police officer — Whether statement voluntarily made — Prosecution must prove that it is voluntarily made — Essential (Security Cases) (Amendment) Regulations, 1975, reg. 21(1) — Internal Security Act, 1960, s. 57(1).

In this case the appellant had been convicted of offences under the Internal Security Act, 1960, and sentenced to death. The main evidence on which the appellant was convicted was his oral statement to a police officer after his arrest. The learned trial judge admitted the statement without considering whether the statement was made voluntarily or not.

Held: (1) in a serious case like this which involved the death sentence the trial judge should have considered whether or not the statement was made voluntarily. As he had not done so the statement was not admissible in evidence;

(2) the rest of the evidence was not strong enough to support the conviction and therefore the conviction must be quashed.

Case referred to:-

(1) *Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.

FEDERAL COURT.

K. Chandran for the appellant.

Shaik Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ibrahim Manan F.J. (delivering the judgment of the Court): The appellant was convicted in the High Court at Kuala Lumpur on two offences under section 57(1) of the Internal Security Act, 1960, one for having in his possession in a security area without lawful excuse certain firearms to wit, an unnumbered .38 Ilama Pistol, a short barrel Smith & Wesson .38 Revolver No. D. 888858 and an unnumbered .32 Chamber Revolver, the other in respect of certain ammunition to wit, 8 rounds of .32 ammunition, 33 rounds of .38 ammunition, 45 rounds of .22 ammunition and a primed handgrenade and sentenced to death.

The said firearms and ammunition were discovered at about 10.15 a.m. on July 30, 1976 in a locked drawer of a locked almirah at house No. 685 Kampong Tasek Permai Baru, Ampany, which belonged to the sister of the appellant. The appellant had earlier been arrested together with one Hong Chai at 12.30 a.m. on the same day in a house No. 20 Jalan Harvey, Sitiawan, Perak. In a room occupied by the appellant Inspector Nawawi also found 2 sets of keys on the floor beside a mattress. The main evidence on which the appellant was convicted was his oral statement made to Inspector Nawawi soon after his arrest that the keys which subsequently were used to open the almirah and drawer belonged to him.

Regulation 21(1) of the Essential (Security cases) (Amendment) Regulations, 1975 provides:

> "A statement made by the accused whether orally or in writing to any person shall be admissible in evidence notwithstanding that such statement —"

was made in circumstances or was of the nature specified in paragraphs (a) to (g) thereof.

This court in *Johnson Tan Han Seng* v. *Public Prosecutor*[1] has ruled that a statement made under the said regulation 21(1) was not admissible unless is was voluntarily made. Suffian L.P. in the course of his judgment in that case said:

> "Regulation 21 does not say that a statement to a police officer is admissible whether made voluntarily or not, and so the prosecution must still prove that it was voluntarily made if they wanted to rely on it..."

In a serious case like this, which involved the death sentence, the trial judge should have considered whether or not the statement was made voluntarily. As he had not done so the statement was not admissible in evidence.

The rest of the evidence was not enough to support the conviction and we therefore allowed the appeal and quashed the conviction and set aside the sentence.

Appeal allowed.

Solicitors: *K. Chandran.*